

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

EDGAR JESUS GARMAN,
Petitioner.

No. 2 CA-CR 2020-0060-PR
Filed June 18, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Maricopa County
No. CR2005141797001DT
The Honorable John R. Doody, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney
By Jeffrey R. Duvendack, Deputy County Attorney, Phoenix
Counsel for Respondent

Law Office of Stephen M. Johnson, Phoenix
By Stephen M. Johnson
Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Edgar Garman seeks review of the trial court’s ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.¹ We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Garman has not shown such abuse here.

¶2 Garman pled guilty in 2006 to kidnapping and attempted sexual assault. The trial court imposed a seven-year prison term for kidnapping and, for attempted sexual assault, suspended the imposition of sentence and placed Garman on lifetime probation.

¶3 In 2017, the state filed a petition to revoke Garman’s probation, alleging numerous violations of his probation terms. Garman admitted violating his probation terms by traveling outside the county. The court revoked probation and imposed a maximum, seven-year prison term, specifically identifying as aggravating factors Garman’s previous felony convictions, the similarity of his crime to one of those previous offenses, and the harm to the victim.

¶4 Garman sought post-conviction relief, arguing his trial counsel had been ineffective in failing to present witnesses at sentencing, the trial court had abused its discretion in imposing the maximum sentence, and the prosecutor had committed misconduct at sentencing. The court summarily dismissed the petition, finding “there is no material issue of fact or law which would entitle [Garman] to relief,” and further noting that,

¹ Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that “applying the rule or amendment would be infeasible or work an injustice.” *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

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even had counsel's performance been deficient, any "errors or omissions . . . did not cause [Garman] to receive a greater sentence than he received." This petition for review followed.

¶5 On review, Garman asserts the trial court erred "by not granting an evidentiary hearing." A defendant is entitled to a hearing if he presents a colorable claim for relief; that is, "he has alleged facts which, if true, would *probably* have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11 (2016).

¶6 First, Garman briefly summarizes his claim that, had his counsel called witnesses to testify at his sentencing, his sentence would have been reduced. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, Garman was required to show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. But Garman ignores the court's conclusion that the testimony would not have altered the sentence imposed. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (failure to cite authority and develop argument waives claim on review). He has therefore failed to show the court abused its discretion in rejecting this claim.

¶7 Garman next repeats his argument that the trial court abused its discretion at sentencing. First, he argues the court erred in concluding he had mental health issues, asserting, without citation to the record, that "[t]wo differen[t] psychologists [had] determined" he did not meet the criteria for involuntary treatment as a sexually violent person. But Garman stated in his disposition memorandum that he suffers from anxiety and depression. Regardless, any error inured in Garman's favor—the court described Garman's mental health issues as mitigating.

¶8 Garman also seems to assert the trial court erred by identifying only two mitigating factors,² identifying as other possible mitigating factors that he "had avoided illegal activity for almost five years" and that his probation violations resulted from a "new probation officer instituting new terms as a power play." But "a sentencing court is not

²The court identified three: Garman's mental health issues, military service, and "very sincere expression of remorse."

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required to find that mitigating circumstances exist merely because mitigating evidence is presented; the court is only required to give the evidence due consideration.” *State v. Cazares*, 205 Ariz. 425, ¶ 8 (App. 2003). The court reviewed the mitigating evidence identified by Garman, which included Garman’s community support, recent employment, and that he “suffers from anxiety and depression.”

¶9 Garman also contends the trial court was unaware whether he had told his girlfriend, who had children, about his background, but nonetheless “listed this matter as an aggravator” at sentencing. But the court did not expressly identify that fact as an aggravating factor – the only aggravating factors so identified by the court were Garman’s previous felony convictions, the similarity of the crime to one of his previous offenses, and the harm to the victim. And, even absent this fact, Garman has identified no reason for us to believe the court was likely to impose a different sentence. *See Amaral*, 239 Ariz. 217, ¶ 11.

¶10 Next, Garman argues the trial court improperly imposed an aggravated sentence because he “fail[ed] to be successful on probation,” citing the court’s comment that it was “disappointed” in Garman’s performance on probation. But, as Garman acknowledges, even if the court treated his conduct while on probation as an aggravating factor, it was permitted to do so. *See State v. Rowe*, 116 Ariz. 283, 284 (1977) (although court may not “impose punishment for violation of probation alone,” court is permitted to consider “the fact that defendant failed to avail himself of the opportunity to reform”).

¶11 Garman also repeats his claims of prosecutorial misconduct, arguing the prosecutor made “several misleading and false statements while asking for an aggravated term.” But, although Garman identifies several statements he finds objectionable, he cites no evidence that those statements are false.³ *See* Ariz. R. Crim. P. 32.16(c)(2)(C) (petition for review must include “specific references to the record”). And, in any event, as the state pointed out, much of the information Garman identifies as misleading was provided in his disposition report, to which he did not object.⁴ The

³One such statement, that Garman had left the “country” without permission, appears to be an obvious and innocent mistake, as Garman had admitted leaving the *county* without permission.

⁴In his reply to the state’s response filed below, Garman stated counsel should have objected, and “[t]his belies the ineffectiveness of defense counsel.” Insofar as this comment could be construed as an

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prosecutor relied on that report and, thus, Garman cannot (and has not attempted to) demonstrate the prosecutor's statements, even if misleading, were intentionally so. *See State v. Murray*, 247 Ariz. 583, ¶ 8 (App. 2019) ("Prosecutorial misconduct is 'intentional conduct which the prosecutor knows to be improper and prejudicial' and that 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety.'" (quoting *State v. Martinez*, 221 Ariz. 383, ¶ 36 (App. 2009))). And, in light of the aggravating factors found by the trial court independent of that report, Garman has not shown any probability he would have received a different sentence had the purported misstatements been corrected to his satisfaction. *See Amaral*, 239 Ariz. 217, ¶ 11.

¶12 We grant review but deny relief.

additional claim of ineffective assistance of counsel, the court was not required to address it. *See State v. Lopez*, 223 Ariz. 238, ¶ 7 (App. 2009) (court not required to address claims first raised in reply brief).